Before the

FEDERAL COMMUNICATIONS COMMISION

Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Act of 1999; Retransmission Consent Issues	)	CS Docket No. 99-363

COMMENTS
OF THE
SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION

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To: The Commission

COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

The Satellite Broadcasting and Communications Association ("SBCA") is pleased to submit these comments in response to the notice of proposed rulemaking released on December 22, 1999, in the above-captioned proceeding.[1]

The SBCA is a national trade association that represents the entire Direct-To-Home satellite industry. The Association's membership includes the principal satellite manufacturers and operators, the operating DBS companies that offer private subscription service to the public, the major program services that are available to DTH consumers as part of subscription packages in both C-Band and DBS services, the manufacturers and distributors of DTH receiving equipment, and the more than 2,500 satellite retail dealers who are the point of sale to consumers.

[1] *In the Matter of Implementation of the Satellite Home Viewer Act of 1999; Retransmission Consent Issues*, CS Docket No. 99-363, ¶ 1 (rel. Dec. 22, 1999) ("NPRM").

In the NPRM, the Commission requests comment on how to implement the provision of the Satellite Home Viewer Improvement Act of 1999[2] instructing the Commission to prohibit broadcast stations from "failing to negotiate in good faith" and from "engaging in exclusive contracts" in retransmission consent negotiations with Multichannel Video Programming Distributors ("MVPDs"), including satellite carriers. As the trade association representing the interests of satellite carriers, SBCA recognizes that the implementation of that provision is of crucial importance to its members and to consumers.

In SHVIA, Congress created a statutory copyright license which permits satellite carriers to retransmit local broadcast stations in those stations' local markets. The SHVIA thus mitigated a major inequity in the treatment of satellite operators as compared to cable operators, against which satellite services compete in the MVPD market. While cable operators could and did retransmit local broadcast channels to subscribers, there was significant doubt over the ability of SBCA's members to do so. That disparity translated into a serious handicap in the marketplace – the lack of local signals was consistently listed as the "number 1" reason for cable subscribers not switching to a satellite service.

SBCA agrees with the Commission that SHVIA must be implemented "aggressively to ensure that the pro-competitive goals underlying this important legislation are realized."[3] The success of SHVIA depends entirely on its implementation. The local-into-local copyright license would be literally useless if the broadcasters were free to

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[2] Act of Nov. 29, 1999, PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), codified in scattered sections of 17 and 47 U.S.C.).

[3] NPRM at ¶ 1.

hamper or prevent altogether retransmission of their local signals by abusing their right to grant retransmission consent.

Cable operators throughout the country have received the broadcasters' retransmission consent for carriage of local signals in almost all instances without paying any monetary fees for that consent. There is no valid competitive marketplace consideration that would justify retransmission agreements with satellite carriers deviating from that norm, especially in light of the fact that another federal agency – the Copyright Office – has already looked at the retransmission marketplace and concluded that the market value of broadcast channel retransmission is zero.[4] At a minimum, therefore, the Commission should protect consumers by resisting attempts by broadcasters to invoke manufactured "marketplace" considerations in order to extract from satellite carriers additional payments beyond the norm that has been formed not by random, isolated deals, but by a nearly uniform pattern of retransmission agreements with cable operators nationwide.

Accordingly, SBCA strongly urges the Commission to adopt specific, concrete rules that clearly define what does and does not constitute bad faith and competitive marketplace considerations. Similarly, SBCA urges the Commission to adopt rules that prohibit television broadcast stations from entering into exclusive retransmission consent agreements, whether those agreements are express or implied.

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[4] *In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Copyright Arbitration Royalty Panel, ("CARP Report"), adopted by the Copyright Royalty Tribunal, 47 FR 19052 (1992), affirmed by the Register of Copyrights, Copyright Office, 62 FR 55742 (1997) ("Final Order"). In addition, the pattern of retransmission agreements between cable operators and broadcasters is particularly probative because they pit powerful media players (the networks and the large Multiple System Operators) against one another, and therefore bargaining is more evenly balanced than in negotiations between the broadcast networks and satellite carriers.

I. THE COMMISSION SHOULD ADOPT SPECIFIC, CONCRETE RULES FOR DETERMINING GOOD FAITH

Section 325(b) of SHVIA expressly requires the Commission to prohibit a television broadcast station from negotiating for its retransmission consent in bad faith. Specifically, Section 325 (b) requires the Commission to:

> . . . prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in **good faith**, and it shall not be a failure to negotiate in **good faith** if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on **competitive marketplace considerations**.[5]

In the NPRM, the Commission seeks guidance on how to interpret the key terms of this provision, *i.e.*, "good faith" and "competitive marketplace considerations."

First, with respect to good faith, SBCA agrees in principle with the Commission's proposal for a two-tiered standard for evaluating what constitutes good faith, including (1) an objective test based on a list of per se violations of good faith; and (2) a subjective test based on a case-by-case evaluation of specific circumstances. The real question, however, is how inclusive this test will be. SBCA emphasizes that the list of per se violations must be tailored to the unique circumstances of the retransmission marketplace, not simply imported wholesale from other areas. The "per se" lists developed to implement good faith duties prescribed by other statutes, such as the 1996 Telecommunications Act's good

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[5] 47 U.S.C. § 325(b)(3)(C)(i) (emphasis supplied).

faith requirement pertaining to negotiations between incumbent local exchange carriages and their competitors, do not capture the core of most of the problems that satellite carriers may encounter. In that regard, SBCA fully supports the lists of per se violations put forward by its members DIRECTV, Inc. and EchoStar Communications Corporation in their separate comments.

Equally important, any list of good faith violations would be of little consequence if not backed by concrete rules on what does and does not constitute "competitive marketplace considerations." Those rules are needed to implement the clear statutory directive that differences in retransmission terms not based on such considerations should be prohibited. Again, SBCA fully supports the views of DIRECTV, Inc. and EchoStar Communications Corporation on the content of these rules.

II. THE COMMISSION SHOULD EXPRESSLY PROHIBIT ALL EXCLUSIVE DEALINGS

Section 325(b) requires the Commission to "prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts."[6] The Commission should make clear that this required proscription on "engaging" in exclusive contracts prohibits both express and implied, de jure and de facto, exclusionary conduct, including literal or effective refusals to deal with a particular MVPD distributor. To interpret this provision otherwise would be to permit broadcast stations to effectively engage in exclusive dealings by, for example, simply refusing to deal with satellite distributors. Indeed, such refusals to deal should also, as discussed above, be considered a per se breach of the good faith obligation.

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[6] 47 U.S.C. § 325(b)(3)(C)(i) (emphasis supplied).

This interpretation is warranted by the language of the statute, which states Congress' intent to prohibit, not just "entering" into specific exclusive agreements, but also "engaging" in exclusive contracts generally. Clearly, the express, broad language of the statute should take precedence over any use of narrower language in the legislative history. In addition, several courts have interpreted "exclusive dealing" broadly as a party's choosing "with whom he will do business and with whom he will not do business."[7] A narrower construction would reduce competition and harm consumers by permitting television broadcast stations to easily evade Congress' clear intent to ban exclusive practices.

III CONCLUSION

In conclusion, SBCA strongly urges the Commission to adopt regulations implementing Section 325(b) consistent with the foregoing comments.

Respectfully submitted,

Satellite Broadcasting and Communications Association

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[7] *See* Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567 (11th Cir. 1991); *see also* Construction Aggregate Transp. Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 772-73 (11th Cir. 1983) (exclusive dealing is practice of choosing to deal with some and not others).